In the Supreme Court of the United States

No. 73-1012

GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., and EDGINGTON OIL COMPANY,
Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., and ERNEST A. COPP,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Reply of Petitioners to Brief of the United States as Amicus Curiae

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On Saturday, October 12, 1974, we received through the mail in the form of corrected page proof a "Brief for the United States as Amicus Curiae". We think this to be untimely under the Court's Rule 42(2), for respondents' brief was due on August 9, 1974, and filed about August 9, and the oral argument is scheduled for October 21. This late filing deprives us of adequate time to reply.

The government does not discuss the questions on which the Writ was granted and does not seek to sustain the reasoning on which the court below rested its decision. The government's

argument is that the terms "engaged in commerce" and "in the course of such commerce" in Sections 3 and 7 of the Clayton Act are the equivalent of "affect commerce" and thus concurrent with the reach of the Sherman Act.

But the government confines itself to Sections 3 and 7 of the Clayton Act *and noticeably avoids applying the argument about the Robinson-Patman Act.** Yet the terms "engaged in commerce" and "in the course of such commerce" are identical in Section 3, in Robinson-Patman, and in Section 2 of Clayton, of which Robinson-Patman is an amendment. As Sections 2 and 3 were enacted at the same time, in 1914, the commerce provisions have the same meaning. We quote them side by side:

Sec. 2. (38 Stat. 730; 15 USCA, sec. 13.)

That it shall be unlawful for *any person engaged in commerce, in the course of such commerce,* either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, *where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce:*

Sec. 3. (38 Stat. 731; 15 USCA, sec. 14.)

That it shall be unlawful *for any person engaged in commerce, in the course of such commerce,* to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser

All emphasis in quotations is added.

*The Robinson-Patman Act is not a favorite of the Antitrust Division of the Department of Justice.

> thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, *where the effect of such lease,* sale, or contract for sale or such condition, agreement or understanding *may be to substantially lessen competition or tend to create a monopoly in any line of commerce."*

Not only are the terms in Sections 2 and 3 the same, but each adds another requirement, that the "effect * * * may be substantially to lessen competition or tend to create a monopoly in any line of commerce." If the words "engaged in commerce" and "in the course of commerce" in Section 3 meant what the government contends, they would be pure surplusage, for they would already be totally encompassed in the "effect" clause.

Furthermore, if the terms "engaged in commerce" and "in the course of such commerce" mean what the government now claims, the lengthy discussion about Section 3 in *Standard Oil Company of California v. United States,* 337 U.S. 293 (1949) would have been unnecessary.

The 1950 amendments to Section 7 of the Clayton Act made no change in the commerce provisions of Section 7, and they ran *pari passu* with Sections 2 and 3, viz.:

> "Sec. 7. (38 Stat. 731; 15 USCA, sec. 18.)
>
> "That no corporation *engaged in commerce* shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation *engaged also in commerce, where the effect* of such acquisition *may be to substantially lessen competition* between the corporation whose stock is so acquired and the corporation making the acquisition, *or to restrain such commerce* in any section or community, or tend to create a monopoly *of any line of commerce."*

Here again, if the words "engaged in commerce" meant what the government now asserts, they were surplusage for they would have already been contained in the "effect" clauses and certainly in the words "to restrain commerce" which read like the Sherman Act.

These sections cannot rationally be read in any way other than as requiring (1) *not only* that the activities substantially affect or restrain interstate commerce, *but also* (2) that they or the parties be "engaged in commerce". The government's new revelation of what these sections mean not only rewrites them but deletes from them the significant terms entirely.

The other arguments of the government are similar to some made in respondents' brief. With the limited time for reply, we adopt as further reply the discussion at pp. 8 through 20 of the "Reply Brief for Petitioners Union Oil Company of California and Industrial Asphalt, Inc.," filed on October 5, 1974. Inasmuch as respondents applied to the Robinson-Patman Act the same arguments that the government applies only to Sections 3 and 7 of the Clayton Act, a major portion of the discussion we adopt is to be found in the discussion in our reply brief above of the Robinson-Patman Act.

CONCLUSION

We respectfully submit that Sections 3 and 7 of the Clayton Act cannot bear the interpretation the government's amicus brief would force upon them.

Dated: San Francisco, California, October 15, 1974.

Respectfully submitted,

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